

(1896) 08 CAL CK 0008
In the Calcutta High Court
Case No : Reference No. 169 of 1896

Nilratan Sen

APPELLANT

Vs

Jogesh Chunder Bhattacharja on behalf of Maharaja Jogendra
Nath Roy Bahadoor of Natore

RESPONDENT

Date of Decision : 11-08-1896

Acts Referred:

Citation : (1896) 08 CAL CK 0008

Judgement

Banerjee, J.—This is a reference from the Sessions Judge of Nadiya, recommending that the proceedings in this case from the institution of the second complaint be set aside, on the ground that the second complaint was instituted after the original complaint had been dismissed under sec. 203 of the Code of Criminal Procedure and before that order of dismissal was set aside by a competent Court. The facts of the case are shortly these :--On the 9th December 1895, the complainant Jogesh Chandra Bhuttacherja filed a petition on behalf of Maharaja Jogendra Narain Bahadoor, of Natore, in the Court of the Joint-Magistrate of Kushtea, alleging that he had remitted Rs. 50 through the accused, to the Maharaja's Suddar Kachari in Joisto 1300, corresponding to May or June 1893, and that when an account was being taken from him, he discovered that the accused had credited Rs. 36 only and misappropriated the balance 14 Rupees.

2. This petition was made over by the Joint-Magistrate for disposal to an Honorary Magistrate, who, after examining the complainant, dismissed the complaint on that same day, being of opinion that the case was of a civil nature.

3. On the 21st December following, the complainant moved the Joint-Magistrate by a petition to revive the case, and he sent the case to the District Magistrate with a view to obtain an order for further enquiry, but he was informed by the District Magistrate that as the complaint had not been instituted on behalf of the Maharaja who was the rightful owner of the money alleged to have been misappropriated, he did not consider it necessary to order a further enquiry.

4. On the 21st February 1896, the complainant Jogesh Chandra Bhuttacherja

filed in the Joint Magistrate's Court of Kushtea a fresh petition of complaint on behalf of the Maharaja Jogendra Narain, Rai Bahadoor, stating substantially the same facts as those set out in the first petition, and the Joint-Magistrate ordered the issue of a warrant against the accused, and after taking evidence for the prosecution drew up a charge against him under Sec. 406 of the Indian Penal Code on the 23rd April 1894. Therefore the accused moved the Sessions Judge, who has referred the case to us.

5. These being the facts of the case, the question that arises for consideration is:-- Are the proceedings of the Joint-Magistrate taken the case upon the second petition of complainant, regular and valid, or ought they to be set aside ? The answer to this question depends no doubt to some extent upon the answer to another question, namely, whether the dismissal of the complaint on the 9th of December was a proper one. If this last question be answered in the affirmative, the proceedings of the joint-Magistrate ought to be set aside. If, on the other hand, the lastmentioned question is answered in the negative, then there will remain the further question whether, notwithstanding that, the dismissal of the original complaint was an improper one, and ought to be set aside, and a further enquiry directed. The proceedings taken by the Joint-Magistrate upon the second petition of complaint before the dismissal of the first complaint was set aside, and after the District Magistrate had declined to interfere in the matter, should not be held to be irregular and invalid, and therefore set aside and an enquiry directed to be made de novo.

6. Now, with reference to the question whether the dismissal of the original complaint on the 9th Dec. 1895, was a proper one, the conclusion we have arrived-at is, that the answer should be in the negative. The ground of the dismissal, as stated in the order of the Honorary Magistrate, is that the case is of a civil nature. This does not appear to be a valid ground, having regard to the facts stated by the complainant in his examination. " If the complainant is to be believed, there does not appear any good reason for thinking that the case ought not to be proceeded with any further. If, considering the smallness of the amount in regard to which the criminal breach of trust is said to have been committed and the lapse of time after which the complaint was lodged, the Honorary Magistrate had found reason to distrust the truth of the complainants case and dismissed it accordingly, that might have been another matter, but that was not the ground of dismissal here. Considering all the circumstances of the case, and seeing that the first complaint was dismissed immediately after the examination of the complainant and without any further enquiry, we are not prepared to hold that dismissal a proper one. We think the case is one in which there ought to be a further enquiry.

7. But there arises the question stated last, namely, whether the enquiry ought now to commence de novo, or whether the case that has been instituted in the Joint-Magistrate's Court upon the second complaint, should be allowed to go on from the stage it has reached. It was argued by Babu Kali Charan Banerjee who

appeared for the prosecution, in the first place, that the dismissal of the original complaint under sec. 203 of the Code of Criminal Procedure was no bar to the institution of fresh proceedings upon a new complaint. And in support of this argument the case *Queen-Empress v. Pooran* ILR 9 All. 85 was cited, and in the second place, that even if that dismissal stood in the way of fresh proceedings being taken, the order of the Court setting it aside will remove every possible objection to the validity of the fresh proceedings, so that they may go on from the point they have reached. On the other hand, it was contended by Babu Surendra Chandra Sen, who appeared for the accused, that though the dismissal of a complaint under sec. 203 does not operate as an acquittal, still, before it is set aside in the manner provided by law, no fresh proceedings can be taken, and such proceedings as have been taken before the order of dismissal was reversed, should be set aside as illegal, and he further urged apparently with good reason, that his objection to the proceeding already taken being allowed to stand was not a mere technical objection, as a part of the proceedings, namely, that relating to the examination of a certain witness who was ordered to be examined by commission, has been irregular, and the irregularity has prejudiced the accused, and if the proceedings are commenced de novo, he will have a further opportunity of having that witness examined.

8. The question raised is an important one, and is by no means free from difficulty. Sec. 403 of the Code of Criminal Procedure, no doubt, expressly provides in the explanation to it, that the dismissal of a complaint is not an acquittal, and there is no express provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed. But, on the other hand, there is no express provision to the contrary, not even such as there was in sec. 147 of the former Code (Act X of 1872), while sec. 437 provides that "the High Court or the Court of Sessions may direct the District Magistrate by himself, or by any of the Magistrates subordinate to him, to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further enquiry into any complaint, which has been dismissed under sec. 203, or into the case of any accused person who has been discharged." When the Code, therefore, distinctly lays down a procedure, for having an order dismissing a complaint under sec. 203 or discharging an accused person set aside and a further enquiry directed, it seems to me reasonable to conclude that the Legislature intends that an order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided. The opposite view would lead to the anomalous and unreasonable result that notwithstanding the dismissal of a complaint or the discharge of an accused person after an elaborate enquiry by one Magistrate, another Magistrate may, merely upon a fresh complaint being filed, take proceedings against the accused again for the same offence and on the same evidence, though he has no authority, as a Court of Appeal or Revision, to examine the correctness of the previous order made in the case. Sec. 403 of the Code of Criminal Procedure merely declares, that an order of discharge or

dismissal of a complaint is not acquittal. That only shows that it is not a bar to fresh proceedings in the same way as an acquittal is, but it does not show that an order of discharge or dismissal of a complaint is to have no effect at all, and that fresh proceedings may be instituted without any notice being taken of such an order. The practice of the Court, as far as we are aware, has been in accordance with the view we take. That view is also in accordance with the rulings of the Madras High Court which are strong authority in its favor, seeing that they are rulings under the old Code (Act X of 1872), sec. 147 of which might be taken to be more in favour of the opposite view than anything contained in the present Code. See proceedings No. 671, 28th March 1878, and No. 1883,--14th November 1878 (Weir, 874-75). In the present case the subsequent proceedings were taken not only after the order of dismissal of the first complaint, but also after the Magistrate of the District had declined to interfere with it, and to order a further enquiry, though upon an erroneous ground, erroneous, because it appears from the original petition of complaint, that the complaint was preferred by Jogesh Chunder Bhuttacharja on behalf of Maharaja Jogendra Narain Rai Bahadoor. The learned Joint-Magistrate in his explanation says, that he took up the enquiry because the complainant on the second occasion was a different person. I do not think that this view of the matter is correct. It is true that in the second petition the complainant is described as Maharaja Jogendra Nath Rai, through his Karpardaz Jogesh Chandra Bhuttacherja, whereas in the first petition he is described as Jogesh Chandra Bhuttacherjee on behalf of Maharaja Jogendra Nath Rai, but the person examined as the complainant was Jogesh Chandra Bhuttacharja in both cases.

9. Then as regards the case of the Queen-Empress v. Pooran, relied upon by Babu Kali Charan Banerjee, I think that it is distinguishable from the present, in two respects. In the first place, there the second complaint was entertained by the very same Magistrate that had dismissed the first, and so the anomaly of one Magistrate sitting in judgment upon the propriety of an order of another Magistrate of coordinate jurisdiction did not arise, and in the next place, there the objection to the proceedings was taken after conviction, and so it might perhaps have been deemed (though that is not stated in the judgment) to be met by sec. 537 of the Criminal Procedure Code. But be that as it may, I am not prepared to follow it in the present case.

10. For the foregoing reasons I am of opinion that the proceedings of the Joint-Magistrate of Kushtea in this case were irregular and invalid by reason of their having been taken whilst the order of dismissal of the original complaint was in force.

11. It remains now to consider whether our setting aside that order and directing further enquiry as we propose to do, has not the effect of validating those proceedings regard being had to the provisions of sec. 537 of the Code of Criminal Procedure I am of opinion that in the circumstances of this case they ought not to be allowed to go on, and that the proper course will be to

commence the enquiry de novo.

12. Moreover I do not think that sec. 537 is intended to apply to a case like the present, which has not been finally disposed of. That section provides that no pending sentence or order passed by a Court of competent jurisdiction, shall be reversed or altered in revision or appeal by reason of any error, omission or irregularity in certain respects unless such error, omission or irregularity has occasioned a failure of justice. The test prescribed for determining whether such error, omission or irregularity should be a ground for setting aside an order is one which can be properly applied only after the final result of the case is known. When an objection is taken on the ground of there being a material error, omission or irregularity before a case is finally disposed of and while there is time to correct the same, it would be unreasonable to hold that sec. 537 intends the error, omission or irregularity to be allowed to remain uncorrected. To hold that would be to give to sec. 537 the effect not only of curing mere formal defects of procedure when discovered too late, but of practically subverting all procedure. Such a view is clearly opposed to the decision of this Court in *Raj Chunder Mojumdar v. Gour Chunder Mojumdar* ILR 22 Cal. 176.

13. The result then is that the proceedings of the Joint-Magistrate of Kushtea in the case, from the institution of the second complaint, should, in my opinion, be set aside, the order of dismissal of the original complaint, dated the 9th of December 1895, should also be set aside, and the District Magistrate directed under sec. 437 of the Code of Criminal Procedure by himself or by any of the Magistrates subordinate to him, to make further enquiry into the complaint in this case which has been dismissed under sec. 203.

O'Kinealy, J.

14. So far as I can ascertain, it has been the constant practice of this Court since the introduction of the Code to prevent new proceedings when the first complaint has been disposed of by an order under sec. 203 until that order is set aside. I am content, therefore, to follow that practice in the present case without any further discussion. I therefore agree that the subsequent proceedings should in this particular case be set aside. Looking also at the reasons given for the disposal of the case under sec. 203, I think that the order should not be allowed to stand in the way of a further enquiry, and setting it aside, I also agree with my colleague that a further enquiry should be made as directed.